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Re: Comparison of City Legislation 747-2019 and CLASH Proposed Ordinance for a Lead Safe Housing Mandate

To Whom It May Concern:

At the request of my client, Cleveland Lead Advocates for Safe Housing (CLASH), I have prepared this letter to inform the public, Cleveland City Council, the Office of the Mayor, the Lead Safe Cleveland Coalition and any other concerned citizen of the key differences between the CLASH lead safe housing legislation and the newly proposed lead safe housing bill introduced on June 3, 2019 by Council Members Griffin, Kelley, McCormack and Mayor Jackson.

By way of background, I was an attorney at the Legal Aid Society of Cleveland when that organization helped to draft an initial lead safe housing bill that was proposed in August 2017. Over the last two years, I continued to research and update the legislation on behalf of CLASH, a community coalition focused on passing a lead-safe housing law in Cleveland. As an attorney in private practice, I was the primary drafter of the CLASH's legislation proposed for a ballot initiative. In the last four months, I have also observed the development of a new lead safe housing recommendations through the Lead Safe Cleveland Coalition (LSCC) process.

Through this work, I have become familiar with the standards and practices for a municipal lead-safe housing law.

Given my background, I have reviewed the legislation proposed by City leaders on Monday night: Proposed Ordinance 747-19. I am writing this letter to compare Proposed Ordinance 747-19, which is now pending in City Council, with the most recent version of CLASH's legislation, which is the subject of a current petition drive to get on the March 2020 ballot.

It is important to note, at the outset, that Proposed Ordinance 747-19 has a core vision that closely tracks CLASH's legislation. Both bills create a preventative lead testing standard for rental properties in Cleveland. Both bills would require that landlords in pre-1978 homes preventatively test their homes for lead in order to get onto the rental registry.

However, the two bills differ in significant ways that the public and City officials should be aware of.

- I. **Proposed Ordinance 747-19 relies exclusively on criminal penalties, while the CLASH legislation relies on combined civil and criminal penalties. If passed as written, Proposed Ordinance 747-19 will likely be struck down as unconstitutional due to its penalty structure.**

Any ordinance to increase standards for housing must have a comprehensive enforcement structure. This enforcement structure is key not only for the sustainability and feasibility of the bill, but also to address constitutional limitations on penalties for property owners.

A line of caselaw has been evolving during the years I've been working on lead safe housing and a recent decision from the federal district court in Ohio has led to a clear conclusion: if the City does not first obtain a warrant to inspect the premises, it is a violation of the Fourth Amendment's search and seizure requirements to criminally punish a landlord for refusing to obtain a lead inspection.

While the connection between a lead inspection and the Fourth Amendment may seem unclear at first, the two are clearly connected under a burgeoning set of cases. If a landlord's only choice is between consenting to a warrantless search of a property (i.e. by allowing a lead inspector, even a private one, into the property) or face criminal penalties, the landlords Fourth Amendment rights will be violated.

In late 2018, the Federal District Court in the Northern District of Ohio - which has Cleveland in its jurisdiction - decided *Pund v. City of Bedford*, 339 F. Supp. 3d 701 (N.D. Ohio 2018). That case concerned the City of Bedford's requirement for homeowners to consent to a warrantless home inspection before property sales. Homeowners that refused an inspection could be found guilty of a misdemeanor. The court ruled that Bedford's law was facially unconstitutional. The law violated the individual's Fourth Amendment right to withhold consent to warrantless inspection. Moreover, the court found that the threat of criminal penalty made it impossible to voluntarily consent to inspection. See also *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015).

While this case law was not as well settled when CLASH initially drafted its legislation, the conclusion after *Pund* is clear: a structure that relies exclusively on criminal penalties opens up the legislation to a serious constitutional challenge.

Because of this new case law, CLASH updated its legislation to utilize a combined civil and criminal penalty model. CLASH uses civil fees to address landlords who violate the lead safe mandate initially, and does not escalate to criminal penalties until after the Department of Building and Housing obtains an administrative warrant to inspect the property.

By comparison, Proposed Ordinance 747-19 currently criminalizes refusal to obtain a lead inspection, which raises the same issue discussed in *Pund*. If Proposed Ordinance 747-19 is passed as drafted, it will be subject to a compelling challenge on constitutional grounds.

II. Proposed Ordinance 747-19 will not create a lead safe housing mandate for all homes until March 1, 2023. The CLASH legislation creates a lead safe housing mandate for all homes as of March 1, 2021

The CLASH legislation creates a uniform enforcement date for all homes in the City of Cleveland: March 1, 2021. After March 1, 2021, Building and Housing will have the full suite of enforcement tools available to it in all zip codes and all regions of the City.

By comparison Proposed Ordinance 747-19 envisions a two-year rollout period with only a fraction of Cleveland rental properties being required to be lead safe as of March 1, 2021. Thereafter, Proposed Ordinance 747-19 envisions a roll-out schedule where portions of the city are added piecemeal. The entire City is not subject to the lead safe housing mandate until March 1, 2023.

III. Proposed Ordinance 747-19 does not address daycare centers in the City of Cleveland, whereas the CLASH legislation ties the lead safety process to daycare registration under Chapter 227 of the City of Cleveland Codified Ordinances.

Fundamentally, daycare centers are regulated at the State and County level. CLASH knows that comprehensive regulation of lead hazards in daycares will require regulation beyond the municipal level. Nevertheless, CLASH believes that acknowledging the importance of lead safety in daycares is a critical part of comprehensive, sustainable lead safe housing legislation at every level of government. As a result, CLASH included a lead safety status requirement to all daycares registered under Chapter 227 of the Cleveland Municipal Code. Under this chapter, daycare centers with 7 or more children are supposed to obtain municipal permits before operating within

City limits. You can read more about the City's regulation of day care facilities here:

http://www.clevelandhealth.org/network/health/day_care_centers.php or in Chapter 227 of the City of Cleveland Codified Ordinances.

Proposed Ordinance 747-19 does not address day-care centers and does not tie the lead safe certificate process to daycare permits under Chapter 227 of the City of Cleveland Codified Ordinances

IV. Proposed Ordinance 747-19 does not require the Mayor to include renters, healthcare professionals, or those directly affected by lead poisoning on a Lead Advisory Board. The CLASH legislation does.

CLASH's legislation envisioned a Lead Advisory Board to oversee the implementation of the new lead-safe standard via quarterly meetings and quarterly reports. Proposed Ordinance 747-19 includes a similar Board that also operates on a quarterly basis. Both bills lay out requirements for the members of the board, but Proposed Ordinance 747-19 does not include key constituent members. Proposed Ordinance 747-19 merely requires that

two (2) shall be representatives from the Lead Safe Cleveland Coalition or similar organization one (1) shall be the Lead-Safe Auditor, and one (1) shall be a current member of the Cleveland Area Board of Realtors or similar organization of realtors.

By comparison, CLASH's bill has requirements that include key constituency groups such as renters, children's healthcare professionals, and those directly affected by lead poisoning:

At least two (2) members of the board shall rent residential real property in the City of Cleveland and reside in that rental as their primary residence. At least two (2) members of the board shall own real property in the City of Cleveland subject to registration under Chapter 365.02. At least two (2) members must work at organizations or public entities which advocate for public health, civil rights, racial justice or youth achievement. At least one (1) member of the board shall be a children's health professional with an Registered Nurse, Medical Doctor, Masters of Public Health or Doctorate of Public Health certification. At least one (1) member of the board shall be the legal parent or guardian of a child who has had an elevated blood lead level test above 5 micrograms per deciliter. At least one (1) member of the board shall be a contractor certified in lead safe renovation, repair and painting.

CLASH's bill also more clearly lays out the requirements and duties of the Lead Advisory Board in its first few years than the language in Proposed Ordinance 747-19.

V. Proposed Ordinance 747-19 does not require lead risk assessments, and instead allows clearance examinations to be used at any stage of the process. The CLASH legislation requires lead risk assessments to be used for initial determinations of lead safety.

The CLASH legislation requires that at least one lead risk assessment take place on the property, followed by clearance examinations in subsequent years. By comparison, Proposed Ordinance 747-19 allows clearance examinations to be used at any stage on any property, even before lead hazards have been identified. A clearance examination is less comprehensive test which provides limited specific information to landlords or tenants about where, exactly, lead-based paint hazards are on the property. Although Proposed Ordinance 747-19 allows landlords to opt for a lead risk assessment, it does not require assessments at any point.

VI. Proposed Ordinance 747-19 does not have all of the protections included in the CLASH legislation

The CLASH legislation has a suite of protections included in the legislation that are missing from Proposed Ordinance 747-19.

First, CLASH is explicit in its legislation that rental units' lead safe status must be accessible to the public through digital platforms and be searchable by address and zip code. CLASH believes this is important for helping Cleveland residents utilize the newly available lead-safe information in their housing search. While Proposed Ordinance 747-19 properly lists lead safe certificates as public records, there are no provisions in regarding accessibility of that data.

Second, because of these same concerns over tenant education, CLASH also includes a provision regarding disclosure of lead safe status in rental advertisements. While Proposed Ordinance 747-19 does include disclosure requirements at the point of *lease* similar to CLASH's legislation, Proposed Ordinance 747-19 does not require that lead safe status be made clear at the point of *advertisement*.

Third, CLASH's legislation explicitly ties lead safe status to tenant protections such as rent depositing and temporary relocation. For instance, under CLASH's bill, if a tenant must leave a property for her own safety during lead safe repairs, the landlord must provide either alternate

accommodations, or a rent abatement. These key tenant protections are not included in Proposed Ordinance 747-19.

Fourth, CLASH's legislation prohibits conflicts of interest between owners of the property and the lead risk assessors or clearance technicians performing the lead tests. Proposed Ordinance 747-19 does not have this protection that is so critical for the independence and integrity of lead testing.

Fifth, CLASH's legislation provided a desirable protection for landlords: a safe harbor for property owners who do the right thing. Under CLASH's bill, proof of lead safety entitles the owner to a rebuttable presumption that a child poisoned while in contact on the property was not poisoned by the lead safe property. This protection is not included in Proposed Ordinance 747-19.

Finally, CLASH's legislation created a fund that could accept both public and private dollars to administer to landlords for testing and remediation of the property. By creating the fund through the public sector, CLASH's legislation ensures public oversight. Proposed Ordinance 747-19 does not appear to anticipate a public funding mechanism, which is in line with the LSCC recommendation that the funding mechanism be housed through a private entity.

There are, of course, provisions in Proposed Ordinance 747-19 that are not in CLASH's legislation. For instance, the 747-19 modifies outdated Renovation, Repair, and Painting (RRP) provisions in Chapter 240, which CLASH has long believed are better addressed through a traditional ordinance process because of the complex overlay of federal law. Proposed Ordinance 747-19 also makes modification to point-of-sale provisions and requires City Council to review the lead safe housing ordinance after 1 year, among other differences.

There are also many provisions of both bills which are similar: protections from retaliation, disclosures to tenants at the point of lease, statutory damages for the violation of EPA disclosure requirements, and a two-year renewal period for lead safe status. I am aware of these aspects of Proposed Ordinance 747-19 and have identified them as part of my review of the legislation.

VII. Conclusion

In sum, while these bills have similar goals at the outset and some similar provisions, there are key differences the public needs to be aware of when

considering whether Proposed Ordinance 747-19 is the best fit for Cleveland's children.

For all the differences I have identified in the legislation, there's one difference that should not matter: how this bill gets passed. Whether through City Council or through a ballot initiative, the most important thing is that Cleveland constructs legislation that protects kids in the best way we know how. I hope that by highlighting key differences between CLASH's legislation the Proposed Ordinance 747-19, I have contributed to this goal.

Sincerely,

/s/ Rebecca Maurer

Rebecca Maurer